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Time, Law, and Legal History – Some Observations and Considerations

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Abstract

This essay addresses perceptions of time and temporality in legal rules and in legal knowledge under changing historical conditions. The first section treats the ongoing »temporal turn« in current debates (I). The second section discusses the notions of time in the 19th, 20th, and 21st centuries (II): Since the late 19th century, the perception of time has undergone a fundamental change. Contrary to the Newtonian tradition, time is no longer perceived as a universal and objective entity. Instead, a process of subjectivization of time has emerged. As a consequence, concepts like the idea of »social time« or »multiple times« have been discussed in the humanities and social sciences. The following section deals with the relationship between law, legal knowledge, and temporality in general (III): Legal rules and legal knowledge can only be understood with reference to temporal modes as the distinction between past / present / future. In this regard, time constitutes a sense-giving dimension of law. As a consequence, legal rules and legal knowledge serve as media of contemporary cultural practices of time and temporality. In this regard, the relationship between law and time is subject to historical change. Particular elements of temporality in the European legal tradition are dealt with in the next section (IV). While continuity and discontinuity as well as notions of eternity all appear as historical constants, how history and its relation to law are grasped is subject to change. This seems all the more true when it comes to our understanding of future, whereas acceleration and its impact on legal normativity show elements of stronger historical continuity.

Keywords: time, future, temporality, risk, (dis-) continuity

Andreas Thier

Time, Law, and Legal History – Some Observations and Considerations*

I. From Space to Time

Apparently, recent research in legal history has turned to »space« – be it geographical or construed – as a subject matter for more in-depth research. Particular interest in the »invention of legal space«,[1] outlines about »legal spaces« (*Rechtsräume*),[2] a recently published anthology,[3] and a newly established legal history volume series[4] under the same title all point to a process of consolidation of a new paradigm taking place within legal history.[5] This newly emerged legal historical interest in space is apparently the result of the adoption of earlier developments in the humanities and the emergence of studies in »spatial humanities«:[6] belonging to a series of several »turns«,[7] what is referred to as the *spatial turn* emerged toward the end of the 20th century[8] and emphasized »space« as a reference point of discourses and cultural practices, e. g., the mediality of spatial constructions as represented in maps.[9]

Within the context of legal history, this spatial turn was also part of the new debate concerning the perspectives, approaches, and methods of a global legal history.[10] The growing interest in the phenomena of globalization has, however, also resulted in a renewed interest in time and temporality both in the humanities and social sciences.[11] Collections of essays like »Timespace: Geographies of Temporality«[12] and »Space, Time, Mediality (*Raum, Zeit, Medialität*)«[13] indicate an interest in temporal phenomena as a dimension of spatial and global issues.[14] Moreover, since around the 1970s, time in general has attracted a great deal of attention, which has already resulted in the identification of a *temporal turn*,[15] even though a healthy dose of skepticism towards the series of new »turns« might be appropriate.[16] Sometimes these developments were also visible in legal history, for example, when Marie Theres Fögen, former editor of this journal, called for a perspective transition in 2006 using the formula »From Space to Time«

* This essay is part of a long-term project; singular aspects have been presented in lectures and talks in Münster, Rome, Edinburgh, Saarbrücken, and Cologne. My sincere thanks go out to Thomas Duve for his kind and amicable support for this paper. I am very grateful for the opportunity to have discussed the subject »time and law« with Adam Kosto, Ada Kuskowski, and Claire Landis in the context of their presentation at the Annual Meeting of the Association for the Study of Law, Culture and the Humanities in April 2017. But I would also like to use this opportunity to express my deep gratitude to James Thompson, not only for his tremendous efforts in editing this text, but also for his helpful and important suggestions beyond style and language. As a matter of fact, the responsibility for all mistakes and flaws is mine and mine alone.

1 Kuskowski (2014) with the suggestive title »Inventing Legal Space«.

2 Ehlers (2016). For a magisterial survey, which connects former approaches on »Rechtskreise« (jurisdictions) with new approaches and perspectives Dölemeyer (2010).

3 Meccarelli / Sastre (2016).

4 For the first volume of this series established at the Max Planck Institute for European Legal History, see Groth (2017).

5 For the interest of legal theory and legal sociology in »legal spaces«, see the outline in Manderson (2005). For a recent effort to conceptualize a topographically informed approach to legal normativity, see Müller-Mall (2013).

6 For surveys on recent debates, see, for example, Bodenhamer et al. (2010); Id. et al. (2015); Gregor / Geddes (2014).

7 On the phenomena of »turns«, which initially began with the »linguistic turn«, see Bachmann-Medick (2016) passim, and as a short survey, see Bachmann-Medick (2010).

8 For an introduction, see Bachmann-Medick (2016) 211–243, Ehlers (2016) 41 ff. (with important references to former traditions that had already emerged in the 19th century), Rau (2013); for more details, see Döring / Thielmann (2009); Csàky / Leitgeb (2009); Schlögel (2003).

9 See, for example, Baumgärtner / Stercken (eds.) (2012); Branch (2014); Fieseler (2013); Lévy (ed.) (2015); Schöller (2015).

10 For a recent survey and description of this approach, see Duve (2016) and Id. (2017).

11 For the connection between space, globalization, and time as current topics of research, see the outline in Hassan (2010) 88–99, and for an analysis, see Lee (2012).

12 May / Thrift (2001).

13 Funken / Löw (2003).

14 For earlier approaches taking up geographies of time, see Glennie / Thrift (1997).

15 As surveys: Geppert / Kössler (2015a) 11, with further references; Hassan (2010) passim.

16 See the deconstruction of turns in terms of the sociology of knowledge in Bachmann-Medick (2016).

(*Vom Raum zur Zeit*).[17] Even though this call was not specifically directed towards legal historical analyses,[18] the fact remains that research in legal history has always included subjects with temporal references. This underlying interest in time as the subject of research comes to the fore in studies, for example, on the importance and understanding of time in the context of Roman law,[19] on the idea of duration and continuity with reference to the (in)famous argument of the »good old law«[20] and customary law,[21] on inter-temporal legislation,[22] prescription,[23] or – in a broader context – revolutions[24] as one of the driving forces of legal evolution and development.

However, to the best of my knowledge, there has been no broader debate about *temporal perspectives in legal history research*. It is certainly true that not all subjects of research need to undergo such a discussion concerning perspectives and possible topics. In the case of time, however, there has been a significant increase in the number of studies dealing with time and temporal phenomena in the course of the 20th and 21st centuries. And given this phenomenon, not to mention the already existing efforts within legal historical research to treat topics related to time and temporality, it can be helpful to discuss some aspects and perspectives of time, law, and legal knowledge. This is all the more true as the evolution of these efforts and approaches demonstrate that and to what extent time can be the subject of *historical* change and thus falls within the scope of disciplines utilizing historical approaches. As such, it is obviously also relevant for legal history.

In what follows, the aforementioned increase in temporal phenomena will be addressed in a first section. It shall be argued that this development was a consequence of changing understandings of time. It had its origin in the subjectification of time, thereby creating an interdependency between singular or collective subjects and temporal perceptions (below II). One expression – or more precisely, one *medium* for the collective perception of temporal phenomena – is represented by legal normativity and also legal knowledge. The reason for this lies in the entanglement of law, temporal elements, and societal action. Temporal elements such as continuity, discontinuity, or the distinction between present, past, and future are necessary conditions for giving sense and meaning to legal rules, their interpretation, and application. As a consequence, law's dependency on different dimensions of time puts legal normativity and legal knowledge in a position where they act as media of contemporary understandings of time (at least to a certain extent) (see section III). Using several examples, the final section of this contribution will demonstrate that even though this relationship between temporality and legal normativity is more or less constant, at least in the European legal tradition, the perceptions and above all, the use of temporal elements changes in the course of historical evolution (see section IV). The essay closes with a short concluding remark (below V).

II. A (Very) Short History of Time in the 20th Century

It seems to be one of the defining characteristics of 20th and 21st-century culture that it was – at least in the context of Western culture – deeply concerned with the interpretation of time.[25] While an overall history of time and its perception in this

17 Fögen (2006) 13.

18 While the following two volumes of *Rechtsgeschichte – Legal History* (10–11) presented several articles on time in general, the relationship between law, time, and history – intentionally – went beyond the subjects covered, as Brupbacher (2007) 13, made clear.

19 Chevreau (2006); as a survey Schermaier (2011); groundbreaking: Nörr (1969). On the notions of time in antique legal history in general, see Jakab (2011).

20 Kern (1972); Liebrecht (2016).

21 Dilcher / Lück / Schulze / Wadle / Weitzel / Wolter (1992), and Pilch (2013), with reference to medieval continental Europe; Kuskowski (2013) for a comparative approach to France and England, and Hudson (2012), 853–855, for the complex relationship of common law and customs in medieval England. For the early modern period see, for example, Garré (2005).

22 Thier (2004) on retroactive legislation in medieval canon law; concurring, but providing important perspective augmentations, Siems (2011). See Avenarius (1993) on Savigny's doctrine of intertemporal private law.

23 Birr (2007).

24 Berman (1983), (2003).

25 For a more or less chronological outline, see Wendorff (1980) 455–663, and Zimmerli / Sandbothe (2007a) 6–14. For a very coherent sketch, see Graf (2012) with a focus on debates in German-speaking historiography; for a broader base, see Esposito (2017a) 11–24; for the debates in sociology, see the literature surveys by Bergmann (1992), Nassehi (2008), Nowotny (1992).

period has apparently yet to be written,[26] it might nevertheless be possible to identify several tendencies and stages of these discourses.

The introduction of »universal« or »standard time« in 1884[27] was one of several catalyzing factors involved in the rise of debates about concepts of time,[28] even though at that point a long tradition of theological, philosophical, and scientific concepts of time and temporalities had already existed.[29] Another important impulse for these debates resulted from Einstein and Minkowski's connection of space and time in the concepts of relativity and spacetime developed at the beginning of the 20th century.[30] The starting point was the departure from the concept of absolute time[31] and temporal dimensions that took place within the context of what has been called the »foundational crisis of physics« (*Grundlagenkrise der Physik*),[32] when Einstein made the argument »that we must not ascribe absolute meaning to the concept of simultaneity; instead, two events that are simultaneous when observed from some particular coordinate system can no longer be considered simultaneous when observed from a system that is moving relative to that system«.[33] With Minkowski's argument that only »a type of union« of space and time would »still stand independently on its own«,[34] time had definitely lost the absolute status it enjoyed in Newton's highly influential theory.[35] If and to what extent the rise of quantum theory in the first third of the 20th century also played a significant role in the crisis of time as an absolute point of reference when it comes to the meaning of the physical world has been the subject of debate.[36]

Unfortunately, within the context of the present essay, only a brief discussion of this topic is possible. More relevant for the purposes of this paper is the importance of the first third of the 20th century as something like an incubation period for fundamentally new approaches to time in all branches of science and scholarship. A telling example of this phenomenon was J. M. E. McTaggart's thesis of the »Unreality of Time«,[37] with his argument about two different series of time – the famous distinction between an A-series (»the distinction of past, present and future«) and a B-Series (»the distinction between earlier and later«) – being comprehensible only by means of a C-series as an expression of their relational quality.[38] McTaggart's argument was one of the more radical – if not belonging to the most radical – expressions for the rising philosophical skepticism toward the conception of time as an absolute, universal reference of being. In other approaches, time became a dimension of human existence as in Heidegger's fundamental concept of »Being and Time«, with its combination of »concern« (*Sorge*) and »temporality« (*Zeitlichkeit*)[39] as modes of man's existential being.[40] The notion that time is rather an element of our understanding of the world instead of an abstract, objective entity beyond subjectivity was by no means essentially new. Kant had already

26 Geppert / Kössler (2015a) 11–13 with further references.

27 Blaise (2011) 69–85. Regarding the impact on later legislation in Germany, see the short survey in Geppert / Kössler (2015a) 21.

28 Kern (1983) 11–15 and passim.

29 For an encyclopedic outline, see Wendorff (1980), Gloy (2008), and Birx (2009); for a more recent publication using an encyclopedic approach, see Demandt (2015), even though particular attention is paid to antiquity and early Christianity. See also the contributions in Bieber (2002), Ehlert (1997), and Klose (2004). For a very popular collection of essays aimed at a wider audience, see Safranski (2015).

30 Abhay / Petkov (2014); Maudlin (2012). For a short, yet very instructive survey, see Corfield (2015) 72–79 and passim.

31 For a very coherent survey on the tradition of this Newtonian idea and its consequences for the understanding of history, see Lundmark (1993) 62–67; in the broader context of a history of ideas about time, see Wendorff (1980) 235–238, and Gloy (2008) 126–129.

32 Survey: Müller / Schmieder (2016) 512–518 with further references.

33 Einstein (1908) 897, here quoted from the translation in Einstein (1989) 145. For a similar interpretation of this statement, see Geppert / Kössler (2015a) 11 f. For a short, yet helpful outline, see also Rindler (2001) 63–71 and passim.

34 Minkowski (1909) 1: [From now on] »sollen Raum für sich und Zeit für sich völlig zu Schatten herabsinken und nur noch eine Art Union der beiden soll Selbständigkeit bewahren«, English in Minkowski (2012) 39: »[…] space by itself and time by itself will recede completely to become mere shadows and only a type of union of the two will still stand independently on its own«.

35 For a short, yet very instructive survey, see Corfield (2015) 72–75.

36 For a survey, see Zimmerli / Sandbothe (2007a) 9–10.

37 Mctaggart (1908).

38 For an excellent survey and analysis of Mctaggart's argument, see Gerber (2006) 181–187, and Lundmark (1993) 68–72 (discussing also the consequences of this argument for historiography).

39 Heidegger (1977).

40 For surveys, see Dostal (2006), Gloy (2008) 179–193, and the contributions in Dreyfus / Wrathall (2005) 191–334, all with further references.

argued that neither time nor space could be understood as »an empirical concept deduced from any experience«, but as »a subjective condition under which alone intuitions take place within us«.[41] In fact, Kant's ideas have been characterized as the »magna charta of modern time philosophy«,[42] which would take a turn towards the subject's perspective of time, particularly in Heidegger, even though the idea of time as a dimension of subjective experience had been around in the philosophical discourse since the late 19th century.[43]

From quite early on, this perspective on time as a dimension of the individual understanding of the world had equivalents in the idea that time figured not only as the subject of *individual* perception, but also served as a reference point for *collective* understandings and beliefs. Apparently, Emile Durkheim's[44] idea that time (as well as space) would be »objectively thought by all men of a particular civilization«, and that it is »the rhythm of social life that is the base of the category of time«,[45] laid the groundwork for the concept of time as the product of a collective social practice – and in Durkheim's case, above all, with regard to religious practice.[46] In an important sense, Pitirim Sorokin and Robert Merton's 1937 publication on »Social Time«[47] condensed these developments into the description of social perceptions of time as »the change or movement of social phenomena in terms of other social phenomena taken as points of reference«.[48] Here, the concept of relativity was combined with the concept of time as the result of collective practice. For instance, in Maurice Halbwachs'[49] well-known concept of collective memory as a temporal cultural practice, this approach was applied to social perception and our memory of the past.

With Marc Bloch[50] – who introduced »*historical time*« as the »very plasma in which events are immersed, and the field within they become intelligible«[51] – time became an object of historiographical research.[52] This eventually led to the distinction of different levels of historical time, as Fernand Braudel[53] did with his division of »historical time into geographical time, social time, and individual time«[54] as well as his famous argument for the »longue durée« as a guiding perspective of historical research.[55] On the other hand, however, it could also form the starting point for the distinction between different kinds of time as used by different social groups, as suggested by Jacques Le Goff. In 1960 he discussed the conflict that erupted between »Merchant's Time and Church's Time in the Middle Ages«,[56] which involved the efforts by merchants to introduce methods of chronometry and the ecclesiastical resistance to these efforts based on the ecclesiastical idea of linear time.

Even though this approach has been highly contested,[57] it nevertheless gives us at least an idea of how the multiplicity of historical times could be understood in terms of a conflict between different social groups and their time regimes. The rising importance of time as a subject of historiographical reflection could, however, also result in the description of historiography as a »type of being in

41 Kant (1781/1922) 30, 33.
42 Sandbothe (1998) 75: »Magna charta der modernen Zeitphilosophie«; for an outline of Kant's concept of time, see Ibid., 75–82, and in greater detail Gloy (2008) 129–151.
43 Kern (1983) 36–57 (for the construction of the past); Schmied (1985) 26–36 (for Bergson); Sandbothe (1998) 82–124 (for the relation between Bergson, Husserl, and Heidegger).
44 Alexander / Smith (2005).
45 Durkheim (1912) 14: *c'est le temps tel qu'il est objectivement pensé par tous les hommes d'une même civilisation*. 628: *c'est le rythme de la vie sociale qui est à la base de la catégorie de temps*.
46 Burke (2004) 618–620.
47 For an outline and a historical assessment, see Schmied (1985) 45–49.
48 Sorokin / Merton (1937/1990) 89 (quoted from the reprint 1990).
49 Halbwachs (1947/1996), (1950). On Halbwachs and his concept, see the contributions in Péquignot (2007), and for a recent study, see Aucher (2013).
50 Schöttler (2006/2015). A short survey is provided in Burke (1990) 15–31.
51 Cf. Bloch (1949) 4–5: »*le temps historique*« as »*le plasma même où baignent les phénomènes et comme le lieu de leur intelligibilité*«. English quotation in the text taken from Bloch (2012) 23.
52 Geppert / Kössler (2015a) 16 f.; see also Burke (2004) 618.
53 Surveys in Burke (1990) 32–64 and Raphael (2006a).
54 Braudel (1995) 21.
55 Braudel (1958). For Braudel's concept, see Lundmark (1993) 62 ff., for an analysis of Braudel and his counterpart Gurvitch, see Maillard (2011).
56 Le Goff (1982).
57 Dohrn-Van Rossum (1992) 21–23, 215–232; for a case study (confirming Dohrn-van Rossum) on late medieval Zurich, see Sutter (2001).

the time of the modern man«, where the »historian of the past« is obliged to »refer to his present«, as Philippe Ariès[58] put it.[59]

The relativity and subjectivity of time – whether embedded in the individual's existence or connected to collective subjectivities like societies – paved the way for the idea of *pluralities of time perceptions*: Helga Nowotny argued that »pluritemporalism«[60] would represent a defining feature of at least modern societies. Particularly influential, however, was the historiographical implementation of temporal pluralities in Reinhart Koselleck's works.[61] Already in his dissertation on »Critique and Crisis«,[62] in his habilitation thesis about »Prussia between Reform and Revolution« (*Preussen zwischen Reform und Revolution*),[63] and in particular, in several influential essays,[64] Koselleck called for, developed (to an extent), and also applied a concept of historical research that he referred to as a »theory of historical *times*«.[65] More or less adopting Heidegger's idea of the presence of temporality in each individual's existence, its being, and feeling, Koselleck widened this perspective and applied it to whole social formations at different points in history. In doing so, Koselleck analyzed historical perceptions of temporal phenomena like history, change, tradition, progress, or the notion of future. As guiding epistemic vectors for these phenomena, Koselleck coined the interlinked duality of »space of experience« (*Erfahrungsraum*) and »horizon of expectation« *(Erwartungshorizont*).[66] These terms marked anthropological and thus trans-historical fundamental categories of perceiving past, present, and future, not to mention their temporal transitions like change or progress. From this perspective, the perception of time and history would change, and Koselleck understood this multiplicity of perceptions in terms of a multiplicity of historical temporalities, i. e., as a multiplicity of *historical times*: »Each according to the chosen thematic, historians recognize, deposited in and about one another, different passages of time which reveal different tempos of change«.[67] Koselleck often described these phenomena by applying spatial attributes such as the term »layers of time« (*Zeitschichten*); a conception that intentionally points »like its geological model, towards several levels of time (*Zeitebenen*) of differing duration and differentiable origin, which are nonetheless present and effectual at the same time«.[68] Against this background, Koselleck argued that the period between 1750 and 1850, indeed, represented something quite special within the course of European history. During this 100 year period, the perception of time, of history, and thus of society, as well as of political power and economy underwent a fundamental change. As a result, he termed this truly special period *Sattelzeit* (saddle period).[69] Koselleck never presented a fully elaborated theory of historical times, nor a fully elaborated overarching sketch about their possible shape and emergence within the course of European history. This is almost certainly due to his deep level of commitment to the historiographic practice. Nevertheless, Koselleck's concept, which was outlined here in an extremely reduced form, represents one of the most remarkable historiographical developments and adoptions of the notions of time and temporality as fundamentally embedded in our human understanding of the world. Given its deep rootedness in the analysis of historical semantics, it provided historical science (as well as legal history[70]) with a strong empirical basis. Moreover, in dealing with temporality in terms of a

58 For more on Ariès, see Hutton (2004) passim, and, with special reference to Ariès' concept of time and historiography, see Ibid., 14–17, 165–183.

59 Ariès (1988) 249 ff.: »Der Historiker der Gegenwart […] muss […] sich auf eine referentielle Vergangenheit beziehen«. History »[…] wird eine Form des Daseins in der Zeit des modernen Menschen«.

60 Nowotny (1992) 428 ff.

61 Dutt / Laube (2013); Olsen (2012); Müller / Schmieder (2016) 278–337; Palonen (2004) 180–309.

62 Koselleck (1988) 127–186.

63 Koselleck (1975).

64 Several contributions have been translated into English, see Koselleck (1985/2004), Koselleck (2002). See also the essays in Koselleck (2000).

65 For a more in-depth analysis: Fisch (2013); Zammito(2004), and Olsen (2012) 217–267.

66 Koselleck (1985a/2004a).

67 Koselleck (2000a) 295: »*Je nach seiner Thematik erkennt der Historiker verschiedene Zeitabläufe, die un- und untereinander gelagert verschiedene Tempi des Wandels aufweisen*.« Translation as provided in Zammito (2004) 125.

68 Koselleck (2000) 9 (Introduction): »*[…] verweisen, wie ihr geologisches Vorbild, auf mehrere Zeitebenen verschiedener Dauer und unterschiedlicher Herkunft, die dennoch gleichzeitig vorhanden und wirksam sind*.« Translation as provided in Zammito (2004) 125.

69 On this term, see Müller / Schmieder (2016) 281–284, and Olsen (2012) 171–172, both with further references.

70 To the best of my knowledge, an account of Koselleck's importance for the legal historical perspective has yet to be written.

historical and cultural phenomenon possessing a substantial social impact, Koselleck paved the way for an enhanced perspective on and understanding of time; a conception that took very seriously the idea that knowledge and the perception of the world were the result of »the social construction of reality«[71] – an idea at the heart of the debate within the sociological discourse in the last third of the 20th century. In particular, it was telling that Thomas Luckmann, one of the most important actors in this debate, also presented several studies regarding the social perception of time.[72]

The turn of attention within the social sciences to the *societal processing of temporality* found a strong expression in Nobert Elias' highly influential essay on time as part of his overall research on civilizational evolution.[73] In Elias' work, the still operative latent distinction between natural, cosmological time, on the one hand, and human, social time (produced via human actions), on the other, were negated. Elias put forward the idea that time was a necessary »symbol of a social institution«. Time made it possible to compare otherwise incomparable sequences of events with each other: »The apparent movement of the sun […] the movements of the hand from one point on a clockface to another, are examples of recurrent patterns that can be used as reference units and means for comparing segments of events in other sequences, the successive segments of events in other sequences cannot be related together directly. As regulative and cognitive *symbols* these units thus take on the meaning of *time units*.«[74] In fact, with this approach the »two opposed theories of time«, »an ›objective‹ fact« versus »a merely ›subjective‹ notion rooted in human nature«,[75] became in a certain sense meaningless. Natural phenomena figured as possible, sometimes crucial points of reference for collective social actions, which served as fundamental conditions for normative regimes such as clocks, calendars, working periods, or – to switch to a more jurisprudential context – statutory periods, default and its compensation, prescription, and similar legal institutions. In Niklas Luhmann's systems theory, the concept of time and temporality as an »aspect of the social construction of reality« experienced a new degree of abstraction. According to Luhmann, time was defined as »the interpretation of reality with regard to the difference between past and future«, and it became relevant only in social formations with »the capacity to mediate relations between past and future in a present«.[76] In this regard, time was essential for every social system in terms of one of the three »meaning dimensions« (*Sinndimensionen*), as Luhmann put it. Social systems needed to work in the »temporal dimension« in order to bring »incipient irreversibilities and a self-relatedness that keeps things from becoming irreversible […] into the meaningfully self-referential organization of psychic and social systems«.[77] In this regard, time made it possible to create order and thus reduce complexity.

This concept of time and temporality as necessary functional elements of differentiated societies as well as Reinhart Koselleck's analytical grasp, with its focus on semantic empiricism, were also expressions for perceptions of temporal phenomena as part of historical change. It was, therefore, no accident that – starting around the 1980s – changing notions of time in history, e. g., in the context of »politics of time«,[78] with a focus on the »sense of time« (*Zeitsinn*),[79] the »authority of time«,[80] or on cultural practices of time,[81] became a subject of historical research and continued to be a very active area of research. This corresponded to a significant increase of interest in interdisciplinary approaches within temporal studies, embodied

71 Berger / Luckmann (1967).
72 See, for example, Luckmann (2007) 165–192: »Time and Identity: Internal, Social and Historical Time« (*Zeit und Identität: Innere, soziale und historische Zeit*).
73 On Elias' theory of civilization and its impact in general, see the contributions in Treibel (2000).
74 Elias (1992) 11, 10 (emphasis added).
75 Elias (1992) 5.
76 Luhmann (1976) 134, 135, 137.
77 Luhmann (1995) 81.
78 Osborne (1995).
79 Rüsen (2003), in particular Rüsen (2003a), Rustemeyer (2003).
80 Brendecke / Fuchs / Koller (2007).
81 See, for example, the contributions in Ehlert (1997) for the period since the Middle Ages, and the articles in Czock / Rathmann-Lutz (2016) and in Humphrey / Ormrod (2001) for the Middle Ages. For a survey on the development of debates and discourses about time and temporality in the Middle Ages, see Czock / Rathmann-Lutz (2016a) 11–16, including a very coherent outline. For one of the most important recent studies on the »time history of the Reformation period«, see Sandl (2011).

not only in several anthologies about temporal themes,[82] but also in the establishment of the *International Society for the Study of Time*.[83] In this regard, it can be said that a kind of prognosis Luhmann made proved true, namely that »time itself is historicized, and all temporal semantics must come to terms with this«.[84]

In these studies, the notion of the relativization of time – be it as part of history or as an element of societal processes – reached a new level. This occurred together with a growing sensibility for different kinds of time cultures outside of the Western tradition, particularly in Asia,[85] and characterized this multiplicity of time perceptions, each of which is dependent on its respective cultural environment, in terms of a *cultural pluritemporalism.* As a consequence, time and temporality were sometimes perceived as fractures of a globalized, yet highly fragmented society and its multiple cultures.[86] Publications and headlines like »breaking up time«[87] signaled the increasingly widespread perception that »time might go to pieces«, as it is expressed in the title of a book written by Aleida Assmann with the telling subtitle »Rise and Fall of the Time Regime of Modernity«.[88] This kind of argument converged with perceptions of a vanishing differentiation between past, present, and future, where »the present has […] *extended* both into the future and into the past«. Behind this thought provoking thesis stood the argument that, with the »notions of precaution and responsibility, through the acknowledgment of the irreparable and the irreversible, and through the notions of heritage and debt«, with a »double indebtedness, toward the past and the future«, the present had become dominant.[89] This notion of a »broad present«[90] corresponded to a widespread notion of the universal dominion of *acceleration* as a defining feature of modernity and in particular postmodernity.[91] Acceleration had already become, however, a subject of broader sociological as well as historical debate in the last third of the 20th century,[92] and thus prompted the following initial statement from the review of several studies on the subject published in 2010: »Acceleration is in some ways old news«.[93] Moreover, it is debatable whether this »accelerationism«[94] even represents an appropriate diagnosis,[95] or if it represents rather a phenomenon of cultural critique[96] that usually occurs in situations and processes of technological and media transitions.[97] Nevertheless, the fact remains that the notion of time compression, of »an ›empty‹ dimension of time«,[98] or more generally spoken, of the *loss of time* is apparently widespread in the current discourse and debate.

III. Law, Legal Knowledge, and Temporality

It might appear as if legal normativity is more or less immune against erosive tendencies of time: It is the defining feature of legal rules that they claim validity, and this claim obviously includes a strong notion of continuity. Moreover, the temporal scope of their application is an integral part of legal rules, which usually apply to future action or, particularly in the case of statutory law, at a defined point in time. So, it seems that legal normativity is in general more or less neutral towards social or, in a broader sense, cultural processes of changing perceptions of time and temporality.

82 See, for example, Aschoff et al. (1983); Baert (2000); Goltschnigg (2011); Lamneck / Tinnefeld (2000); Sandbothe / Zimmerli (1994); see also Zimmerli / Sandbothe (2007).
83 Parker (2013).
84 Luhmann (1995) 90.
85 See, for example, Schmidtpott (2015) and Steineck (2017) on Japan.
86 See, for example, Mavrofides et al. (2014) with further references.
87 Lorenz / Bevernage (2013).
88 Cf. Assmann (2013): Ist die Zeit aus den Fugen? Aufstieg und Fall des Zeitregimes der Moderne.
89 Hartog (2015) 201.
90 Gumbrecht (2014).
91 Survey in Esposito (2017a) 18–24, and Geppert / Kössler (2015) 26–31, both with further references. For what is almost considered a classic text, see Rosa (2005), in English Rosa (2015), and Rosa (2010), (2013).
92 Koselleck (1976/2000), Id. (2000a).
93 Crang (2010) 404.
94 Cf. Geppert / Kössler (2015a) 29: »Akzelerationalismus«.
95 For vehement criticism from a sociological point of view, see Wajcman (2008) 61–64 and passim.
96 In this general direction, see also Esposito (2017a) 24.
97 A similar approach can be found in Escudier (2011).
98 Giddens (1991) 16, also 48 with reference to the loss of tradition as a part of modern time perception.

Upon closer inspection, however, the relation between law and time appears to be more ambiguous: At least with regards to the history of Europe, legal normativity presents itself as oscillating between continuity and discontinuity. In other words, it fluctuates between the »return of legal figures« (*Wiederkehr der Rechtsfiguren*)[99] and the great importance of conceptual and regulatory traditions. On the one hand, examples of the latter include the law of obligations.[100] On the other, examples for the obvious impact of contemporary interests, conflicts, and cultures occur in the case of feudal law and the manorial system or the prosecution of alleged magical practices and their actors.

This kind of ambiguity regarding continuity and change in legal normativity and knowledge suggests that their relation to time and temporality might be more complex. It is obvious that there are different possible approaches and perspectives to the relation between law and time. A more philosophical approach[101] would certainly pursue another avenue compared to a more doctrinal analysis of time-related legal rules, for example, on prescription, statutory periods of limitation, or the retroactive validity of legislatory norms.[102] A sociological approach would focus on the societal function of law »to anticipate, at least on the level of expectations, a still unknown, genuinely uncertain future«, as Niklas Luhmann has put it.[103] Nevertheless, it should be possible to sketch at least a few overarching aspects of this relationship: Law and our understanding of legal normativity are, as already indicated above, obviously intertwined with at least a basic conception or sense of different temporal modes that distinguish between past / present / future, or the difference between continuity and discontinuity, or, to provide one last example, the notion of eternity as opposed to the idea of permanent change. The conceptions of, for instance, fixed periods and statutory limitations as well as the idea of the forfeiture of rights and claims by certain kinds of action over a longer period are apparently based on different ideas of time being present in law. A certain kind of culmination of this presence of time in law is represented by the famous »legal second«,[104] which even ostensibly points, at least on the surface, to something like »legal time«.[105] In each of these cases, time is apparently a necessary epistemic precondition for imbuing these rules with sense and meaning.[106] In this regard, time can be described as an essential element of providing sense to legal rules and the reasoning concerning these legal rules – in other words as a *sense-giving dimension of law*.[107]

The relationship between law and time is, however, (at least to an extent) subject to historical change. In this regard the relation between law and time is part of the general entanglements of law and legal knowledge with historically changing perceptions of society, economy, politics and policies, and even nature: The idea, for instance, that a group of human beings could be understood as a legal entity, which has rights and obligations (thus another legal status) other than those of the individual human members of the group, has been traced back to different conceptions of nature, man, and more generally, being in both late antiquity and medieval theology.[108] Whereas the concept of contractual obligations (entailing a binding force), to provide another example, can be traced back to medieval religious ideas about the binding force of promises, within the course of the Enlightenment the idea of *socialitas*, the consent of two individuals, and thus the idea of individual law-creating power became dominant.[109] As these examples demonstrate, law and legal knowledge adopt changing interpretations of the world. This is not to deny the capacities and qualities of legal normativity as a means of protection and organization. Rather, it simply acknowledges that law and legal knowledge are always connected to and

99 Mayer-Maly (1971).
100 Zimmermann (1990).
101 As an example, see Husserl (1955) and Kirste (1998).
102 As an example, see Winkler (1995).
103 Luhmann (2004) 147.
104 Marotzke (1991) with further references; from a legal historical perspective, see Wieacker (1962).
105 Lembcke (2009); see also Kirste (2002).
106 For a similar line of thought, yet not in the legal realm, see Rüsen (2003a) and Rustemeyer (2003).
107 The German counterpart of this expression is *Sinndimension*, which has been translated in Luhmann (2004) 205 and passim as »dimension of meaning«.
108 Cf. Schneider (2016).
109 Cf. Thier (2007) N 14, 19 with further references.

the result of changing cultural practices, and in this regard they frequently reflect but also process and elaborate contemporary understandings of the world.[110] Moreover, it has even been argued that law *is* actually just an observational perspective on the world.[111]

In this regard, legal normativity and legal knowledge can be described as a *medium* of changing perceptions and an understanding of the world as a whole. This also (and particularly) holds true with regard to time: The perception of time and different temporal states or dimensions (such as the past or acceleration) is obviously the subject of changing perceptions and understandings, as was demonstrated in the prior section. It can even be said that there are occasions when legal rules are *part* of contemporary *cultural practices of time and temporality.* Such instances include when legal rules establish regimes of time like calendar reforms or norms regarding working hours. It is also the case when law deals with history, for example, when establishing practices of collective memory and sometimes even collective oblivion that are enforced by law, like in cases of the *damnatio memoriae*.[112] While quite a number of possible cases and situations along these lines could be mentioned, such discussions would exceed the scope of this contribution.

There is yet another aspect that, unfortunately, can only be briefly touched upon here: From a normative perspective, the lack of a uniform, universal concept of time results in the necessity of providing reasons for the use of specific temporal concepts when it comes to the establishment of legal rules with temporal reference.[113] For instance, the introduction or modification of limitation periods for particular crimes like murder or genocide, or even the renunciation of such limitation periods will nearly always result in the question of its justification. There might even be something like an individual right of justification for such changes to limitation periods[114] that goes beyond the reference to the principle of democratically legitimized legislatory power. But, again, this is an issue that exceeds the scope of this essay.

Yet when it comes to *legal historical research*, an even more important point needs to be considered: Notions of temporality – in particular the distinction of past, present, and future – seem to represent cultural constants, at least in the context of the European history of (philosophical) conceptions of time. Nevertheless, their understanding as well as their relation to human action are subject to historical change. In other words, it could be said that there is a kind of *temporal epistemé of legal normativity that is (potentially) historically mutable.* The medieval jurist Bartolus of Sassoferrato expressed the epistemic necessity of time for law when he stated, »*temporis intervallum requiritur in facto hominis*« (an interval of time is required in the action of man) in order to give sense to legal rules (in Bartolus' case, rules about hereditary succession).[115] Law and legal knowledge adopt, process, and express the changes that occur with respect to concepts of temporality and time. As such, their dependence on temporality as a dimension of meaning, law, and legal knowledge will presumably function as media of changing cultural notions of time and temporality.

It is, however, a defining feature of a medium that it does not mirror or store the communicated content; instead, media create their own dynamics of content that are then mediated.[116] While this applies to law, it is particularly evident in legal history, for it offers striking examples of differences between legal cultures based on, for instance, orality, like the early medieval tribal societies,[117] and based on literality, like the medieval church.[118] Another example would be the impact of the invention of the printing press on law and legal doctrine in the 15th century;[119] moreover, the consequences of digitalization for law and jurisprudence are obviously a subject of intense debate in the present day and age. So, if law is understood

110 On this aspect and its general importance for legal historical perspectives, see Thier (2015) 271.
111 Haltern (2012) 93.
112 Scholz et al. (2014).
113 An excellent contribution on this aspect can be found in Asholt (2016) 218–221 and passim.
114 On the »right to justification« in general, see Forst (2014).
115 Bartolus (1550), ad D. 30.91.1, fol. 25ra (*Summarium*), in greater detail in Ibid., n. 1, fol. 25rb.
116 For this argument, see, for example, Krämer (2015) 13–37 and passim with an elaboration of the messenger model.
117 Dilcher (2008).
118 Landau (2006).
119 Vesting (2013), Thier (2017a).

as the media of time and temporality, then legal normativity is not neutral in its use of time. Retroactivity, for example, is a temporal legal category that can be addressed in different ways by elaborating rules of protection against retroactive action or by using retroactivity as a means of achieving greater efficiency when it comes to legal rulings.[120] Rules concerning insurance, for instance, are oriented toward potential damages, that is, a future not yet present, and thus to the notions of risk and danger. But this temporal aspect does not say anything about the *normative direction connected with managing this kind of future*. That means that legal historical research about the relationship between law and temporality should at least be aware of the fact that law and legal knowledge are, regarding their processing (*Verarbeitung*) of time, anything but neutral towards contemporary conflicts, interests, political and social structures, economic tensions, or cultural values.[121]

The arguments and perspectives discussed so far necessarily entail a very high level of abstraction. In what follows, I will try to address these perspectives in more specific terms.

IV. Temporal Elements in European Legal Cultures Since Late Antiquity

It seems as though temporality serves an especially important function as an epistemic element in law when it comes to the dimensions of *continuity and duration* (and their opposites: discontinuity and change); the same also holds for the notion of eternity and its opponent, mutability (below A). *History*, as another kind of temporal dimension, also plays a special role in the context of legal knowledge: As in so many other contexts, (changing) narratives of history have been used to describe the identity of legal orders, whether established by God, mankind, or nations. In terms of some sort of transcendental scheme of general order, history became, among other things, an important device for structuring legal normativity (below B). Even though the *future* as a temporal dimension was already present in medieval legal culture, only since the early modern period did it start to exert a significant impact on the evolution of legal normativity. To a certain extent overlapping with ideas about a general order of history, the future was conceived in terms of both chance and potential danger. As a result, law would eventually become one of the most important instruments for managing risk and thus for »colonis[ing] the future«[122] (below C). A final temporal element of importance for legal evolution is the notion of *acceleration*, of *compressed time*, and thus of the necessity for urgent action. It seems that within the context of European legal culture, in particular this perception of temporal speed would serve as the justification for the reduction of procedural order and thus of legal complexity, which were initially created as safeguards against the abuse of power (below D).

This list is by no means comprehensive; its purpose is merely to stimulate thought and to point to further signs and uses of temporality in law and legal knowledge. Another caveat regarding this period of time needs to be addressed: The history of antiquity has intentionally been left out due to the author's limited expertise regarding this historical period.

A. Continuity and Duration, Discontinuity and Change

Continuity and duration, as general temporal phenomena, are probably very closely connected with the experience of trust, even though it can also lead to boredom: an emotional status that, as Martina Kessel has demonstrated with regards to the Enlightenment, is closely linked to the temporal circumscriptions of human identities.[123] These aspects point to the ambivalence of continuity and duration, which – in the context of legal order – can be understood as guaranteeing a proven level of quality, stability, and, by means of permanent use, a very well-established practice, on the one hand, and as reasons for sclerotic stiffness, the incapacity for reform and reorganization, and dysfunctionality due to changes of context, on the other. In fact, this kind of ambivalence developed a strong presence in legal practice already in the medieval period. The idea of *customary law*[124] as

120 Siems (2011), Thier (2004).

121 A similar perspective can be found in Schermaier (2011), 241–243 and passim.

122 Cf. Giddens (1991) 111. On the history of the well-known term »colonisation of the future«, see Zwierlein (2010) 262 with further references.

123 Kessel (2001) 80–81, 161–163, 335–337, and passim.

124 See references above, note 20.

established by long-term use of specific unwritten rules was apparently quite widespread. The reference to *consuetudinibus antiquitus traditis et jure non scripto* such as in the »Constitution of Peace« of Mainz 1235,[125] or the confirmation by Emperor Otto III. in 992 to the Venetians *ut nulla nova consuetudo eis imponatur, sed secundum antiquam consuetudinem et iussionem pacti patris nostri eis pacifice liceat vivere*[126] demonstrated this kind of use, which has been analyzed in Hermann Krause's masterful contribution.[127] This corresponded to the fact that the learnt law of the Middle Ages developed very elaborate doctrines of *consuetudo*. Moreover, the concepts of continuity and duration of law was translated into the notion of maturity and special quality of such kinds of law. This led to the notion of the *good old law*, which has become a well-known subject of legal historical debate since its introduction by Fritz Kern in 1919.[128] Quite probably, Kern's conception of medieval law as »timeless« and »immutable« was to a certain extent inspired by his detached or remote stance toward the idea of progress and thus change in social, economic, and in particular legal orders, which were present in the early 20th-century discourses.[129] But apart from that, it seems as if the reference to the age of a given law or legal system to legitimate its validity was in fact frequently used. A vivid example of this is found in the Saxon Mirror, when its author, Eike, highlighted the fact that »I did not invent this law myself; it has been handed down to us by our *benevolent ancestors*«.[130] Yet this kind of reference probably represented more than a mere inclination toward the concepts of duration and continuity in medieval legal culture. References to tradition, to proven legal rules, to well-established customary law often served – particularly in the rural context – as legitimations for the validity of newly negotiated obligations and entitlements, which, however, were embedded in the notion of old, existing legal traditions.[131]

In these contexts, the reference to a specific temporal dimension of legal normativity – its alleged *age and duration* – and thus to something seemingly beyond human intervention ultimately became the basis for the claim of the validity of legal rules. On the other hand, however, the validity of long-standing customs could become the subject of confirmation by a ruler, or even serve as the point of reference for substitution by a decree of a ruler. This was combined with the idea of the power of rulers to change existing rules in order to adapt them to the change of time.[132] When Frederick II. of Hohenstaufen, for example, issued the Constitutions of Melfi in 1231, he emphasized his power to issue new rules if it became necessary *per rerum mutationes et temporum*,[133] while Pope Gregory VII. claimed in his famous (though apparently written for more or less internal purposes) *dictatus papae* of 1075[134] the papal power *pro temporis necessitate novas leges condere*.[135] It appears as if above all these temporal descriptions of legislatory power in terms of the competence to create something new became the enduring, more definitive feature of legislation. In 1765, for example, Karl Ferdinand Hommel stressed the argument *alia reipublicae forma, alii mores, alia tempora alias quoque leges postulant*,[136] and ultimately in 1830 Jeremy Bentham made the variability of legislatory rules their defining feature by arguing that they are» variable at all times, variable at the pleasure of the Legislature for the time being, – is every article in this and every other Code«.[137] Here, the tension between the continuity and discontinuity of legal rules was used as a frame of reference for the description of law-making power.[138]

This temporal scheme also worked, however, in the other direction, that is, as a means to describe the limitations of all forms of human power, in general, and of the power of individuals or specific groups, in particular. In these contexts, the dura-

125 Weiland (1896/1963), Nr. 196, pp. 241–246, 241: *Constitutio pacis*, 15th August 1235.
126 Weiland (1893/1963), Nr. 20, pp. 45–46, 45: *Praeceptum confirmationis Venetis datum*, 19th July 992.
127 Krause (1958) 209–211 and passim.
128 Kern (1972).
129 Liebrecht (2016).
130 Cf. Eckhardt (1955) 41 with lines 151–154: *dit recht hebbe ek selve nicht irdacht, it hebbet van aldere an unsik gebracht, unsere guden vorevaren* (taken from the rhyme preface); for the translation into English, see Dobozy (1999) 13; additions added.
131 teuscher (2013).
132 For a general treatment of these concepts in the Middle Ages, see Klinkenberg (1969).
133 Constitutions of Melfi I.38.1, in: Stürner (1996) 192.
134 Thier (2008).
135 Caspar (1955) 203.
136 Hommel, Principis cura legis (1765) in Polley (1975) 26–27.
137 Bentham (1983) 44.
138 For more details on these statements, see Thier (2006), 256–259 with further references.

tion and continuity of law and legal order were frequently described as something off limits to rule-making activities. As we have already seen, early medieval kings were apparently bound by the dispositions of their predecessors via land grants, assuming these dispositions were in accordance with contemporary normative values.[139] The emergence of the idea of transpersonal political power points in a similar direction, which, as Carol Greenhouse very convincingly argued,[140] included the idea of transpersonal continuity: The famous tension between the »king's two bodies« – between the king as a human being and the king as an institutional entity[141] – corresponded to the tension between the temporal dimensions, that is, the biologically limited lifespan of a rule and the temporal infinity of his rulership. In this regard, two opposing elements of temporality – i. e., eternity and immutability, on the one hand, and mutability and temporariness, on the other – converge: The idea of *temporal infinity* (*semper* / always), or to use another term *eternity*, in opposition to *temporariness*, on the one hand, was connected with the idea of immutability of certain kinds of law or legal rights, on the other. In the medieval context, this kind of merger typically occurred in the idea of divine and / or natural law, as it had already been laid out in ancient Roman law (Inst. 1.2.11) with its description as *divina quadam providentia constituta semper firma atque immutabilia*, and it was adopted in the context of the *ius commune*, for example, by Gratian's argument *naturale ius […] nec variatur tempore, sed immutabile permanet* (D. 5 pr.). These well-known statements, which could easily be augmented,[142] point to a layer of legal normativity characterized by its temporal quality – immutability – as beyond human legal action. In other words, natural law of this kind represented, due to its immutability, something that was, therefore, beyond other legal norms and legal disposition. This quality will be referred to here as *transcendence* (a quality of rules or institutions lying beyond every human power, even though it is not necessarily religiously connotated).[143] Legal orders seem to demand this kind of transcendence in order to create different levels of normative validity and thus distinctions of changeable and immutable rules. Since the late 18th century, the Western legal tradition is well accustomed to this kind of structure as embodied in the concept of constitutional law, which is rooted in the idea of natural laws as well as *leges fundamentales*.[144] It seems important to note that this kind of transcendent legal normativity was – inter alia – defined by its special kind of non-temporality. Thus time, again, apparently served – and, if we take a look at modern constitutional *eternity clausula* as in the German Federal Constitution,[145] still serves today – as a necessary reference for describing certain *dimensions of legal validity*. If this hypothesis is correct, it also points to another area where dimensions of temporality are necessary elements for understanding law and legal change: It might be fruitful to take a closer look at the making and also (non-)application of law in the *context of revolutionary turmoil*. It seems to be a defining feature of the culture of political turmoil that it creates temporalities of its own, in particular notions of discontinuity, disruption, and restauration, but – at least in the early modern and modern periods – also expectations for another, better future.[146] Harold Berman has even argued that the Western legal tradition was a result of a whole series of such revolutions.[147] It might be fruitful to take a closer look at the legal temporality of such revolutionary turmoil and its use by revolution-

139 Dorn (1991).
140 Greenhouse (1996) 93.
141 Kantorowicz (1957/2016). See also Gierke (1922).
142 Weigand (1967).
143 On this concept of transcendence, see Vorländer (2013) with further references.
144 Mohnhaupt / Grimm (2002).
145 Cf. Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, last amended by Article 1 of the Act of 23 December 2014 (Federal Law Gazette I p. 2438), as translated by Christian Tomuschat and David P. Currie, translation revised by Christian Tomuschat and Professor Donald P. Kommers in cooperation with the Language Service of the German Bundestag, online https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0416, here Art. 79 section 3: »Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible«. On the problems of eternity in the German Federal Constitution, see Dreier (2009).
146 Becker (1999).
147 Berman (1983), (2003).

aries, for example, in the context of actions of expropriation.[148]

These remarks can, of course, only hint at a few potential subjects for further research. Moreover, they are highly fragmented and lack any kind of evolutionary perspective. But it is possible that above all in the contexts of duration and change as well as eternity and mutability that a kind of constant of legal normativity – at least in the context of Western traditions – comes to the fore. This is, however, not the case in another dimension of temporality, which will be discussed in what follows.

B. *History: On Origins, Traditions, and the Final Ends*

The notion of »history« – understood not as mere duration or the past in isolation, but as one or several processes in the past that are the subject of memory in the present and, therefore, are also the subject of interpretation and the attribution of meaningful entanglements – obviously is of importance for law and legal knowledge. It would seem that there are several kinds of »law's history«[149] as well as their functions in legal cultures.

In its most basic form, history constitutes a bridge between past and present; as an epistemic category, it thus becomes possible to understand situations and specifically normative rules as the result of something that has happened in the past. Understood as a process of linear evolution, history is apparently a potential starting point for generating order within legal texts. Typical examples include the *Collectio Dionysiana*, created around 500 in Rome,[150] and the *Collectio Hispana*, compiled in the 7th century[151]– both of which are so-called chronological collections of canon law.[152] Both collections included inter alia conciliar canons in a chronological order; in this regard, they employ a linear conception of history as a reference point for their efforts to create order in a large bundle of legal texts. Interestingly enough, both collections made one exception to the chronological order: They placed canons of the first council of Nicaea (325)[153](more or less)[154] at the beginning, and only after its texts did the other canons follow. The preface of the *Dionysiana* stated that the canons »of all councils, whether held before or after that one« (i. e., the council of Nicaea).[155] The *Hispana* collection took the same approach and argued, »at the beginning of this volume we put the synod of Nicaea, because of the authority of the same great council. Then we placed … various Greek and Latin councils, whether they were held before or after, arranged in chronological order …«.[156] In these statements, two categories for ordering legal rules were used: The conception of history as a linear process provided the basic element of order. But this kind of order establishing the authority of history was superseded by the ecclesiastical authority of the Nicaean council. In creating this kind of tension between the two kinds of authority, the importance of the Nicaean council became particularly visible, while the reference to history and chronological order literally served as the background for this image.

A more differentiated, but apparently infrequent use of the history of legal texts can be observed in the efforts of French humanistic jurisprudence: Here, the history of Roman legal texts was used as a scheme for the structuring or ordering of commentaries on these legal rules. Interestingly enough, this kind of connection of history

148 Thier (2013).

149 Cf. the title of Raban (2013), even though his publication deals with the impact of European 19th century jurisprudence and legal history on the legal culture in the United States.

150 For a survey: Kéry (1999) 9–12; Firey (2008); Maassen (1870) 422–440.

151 Kéry (1999) 61–67; Maassen (1870) 667–716, 802–806,and recently Scherer (2016).

152 For more on these kinds of canon law collections, see Massen (1870) 8–797, referred to here as *Sammlungen der historischen Ordnung* (»collection of the historical order«). On the organizational patterns of medieval canon law collections prior to the 12th century as a survey, see Fransen (1973) 13–14.

153 As a survey: Brennecke (1994).

154 In the *Dionysiana* (first collection of councils), the so-called »Apostolic Canons« were inserted at the top of the list. For a more detailed account, see Firey (2008).

155 Cf. the edition in Glorie (1972) 41: *... deinde regulas Nicaenae Deinde regulas Nicaenae synodi, et deinceps omnium conciliorum, sive quae ante eam, sive quae postmodum facta sunt*; translation in Somerville / Brasington (1998) 48.

156 Cf. the edition in Martínez Díez / Rodríguez (1982) 45: *In principio autem huius uoluminis Nicenam synodum constituimus propter auctoritatem eiusdem magni concilii. Deinceps diversorum conciliorum graecorum ac latinorum, siue quae antea seu quae postmodum facta sunt sub ordine... temporum*. Translation in Somerville / Brasington (1998) 56.

and doctrinal analysis never really caught on, at least not in the *ius commune* tradition.[157]

Beyond this use of (allegedly) historical order, there are approaches where history refers to the idea of a certain path of development of past, present, and even future evolutionary processes.[158] A vivid example for this concept of history is the idea of salvation history, which has a definite starting point with the creation of the world and a definite end with the apocalypse and the coming of the divine reign.[159] Concepts like this one were occasionally present in arguments about legal rules and institutions. They could appear in the context of the idea of the purgatory as a stage of human history shortly before its end,[160] or with reference to the origins of law in the Fall and the early history of mankind as it occurs in the debate about the idea of individual property,[161] or in the distinction between *ius naturae* and *ius gentium*.[162] Other examples would be the creation of historical narratives regarding the status of the pope and its law within a changing world in order to argue for or against papal power.[163]

It is quite obvious that when the concepts of history change, particularly with the rise of the notion of mankind as the subject of history (instead of God) in the course of the early modern period,[164] their relation to law and to legal knowledge change as well. The change from the Fall to the natural state of man, for example,[165] which occurred in the 17th century, reflects this kind of transition. But in the course of further development, by the end of the 18th century, history had, again, changed its subject matter and, as a consequence, so too its function within legal thought: With the rise of national histories and thus the »nation« as the new subject of history in the age of the German Historical School, the evolving narratives of national tradition were initially used to define legal normativity as a product of national identity, which was represented by national history. But apart from this function that attributed an identity to a particular national law, history seemed increasingly to lose its influence on law and legal doctrine. The perception of law as the result of legislation and defined by its internal system[166] did not leave much room for history to make a specific impact. Moreover, with the rise of constitutions as media and devices of collective national self-description, overarching concepts of history lost their influence.[167] In other words, law became (probably for the first time) autonomous in its relation to history.

Nevertheless, specific legal rules – not only in this context – and (to a certain extent) also legal knowledge began to work as agents for *collective memory*:[168] It is no coincidence that (particularly) since the 19th century, more and more rules emerged that dealt with and legally created national heritages and would later on establish the protection of cultural property as part of the legal protection of collective memory.[169] Moreover, collective historical narratives or even foundational myths were presented particularly in the prologues of constitutions as part of their integrative efforts and their symbolic representation.[170] Not alone in

157 Thier (2014) 226–227 with further references.

158 Similar approach in Goetz (2008) 208–242, and Czock / Rathmann-Lutz (2016a) 16–21, as well as the contributions in Czock / Rathmann-Lutz (2016) in general.

159 Survey in Schmolinsky (2013) 96–99 with further references; see also Ertl (2006) 306–330. In greater detail, see Czock (2016) 116–120, Kleine (2016) 143–147, both with further references.

160 Moreira (2010).

161 Thier (2016).

162 Thier (2015a).

163 Ertl (2006) 322–364.

164 Koselleck (1985b/2004b).

165 On this transition, see Thier (2016). It appears, however, that this transition took place in a less than uniform fashion; in this regard, there might be further differentiations present than identified in Thier (2016).

166 Schröder (2012) 193–277.

167 Similar Wieacker (1967) 348 with the observation of a »positivism of the national state« (*nationalstaatlicher Positivismus*). See also Seinecke (2015) 53–55, from the perspective of declining legal pluralism.

168 As an outline for the impact of this perspective on present research in the humanities, see Sandl (2005), and as an introduction, see Erll (2017).

169 Hammer (1995) with regard to Germany; Schipper / Frank (2013), for the protection of cultural property in public international law of war; Odendahl (2005), with a multi-level approach; see also Vrdoljak (2006) for the role of the museums. For a very coherent and fruitful study on the case of Norway, see Eriksen (2014).

170 On these phenomena, see Vorländer (2004) and Id. (2012) 31–37; see also the contributions in Melville / Vorländer (2002), and Depenheuer (2009).

this context, constitutions and other legal rules had also dealt with the perception of past injustices, their sanction, their memory, the task of coming to terms with the past, and establishing, at the same time, procedures of transitional justice.[171]

Another type of »history« applies primarily to legal knowledge: At least in the more complex jurisprudential discourses, references to the past and the history of legal reasoning frequently serve to describe their own position in stronger terms by means of distance or reference to a very well-established tradition. A typical example for this use of history is the self-description of the humanist *mos gallicus* as an opponent to the allegedly sclerotic, old, and traditional *mos italicus*.[172] On the other hand, historical accounts of, for example, natural law in the 18th century, such as Christian Thomasius' *Historia juris naturalis*, with its elaboration of different *lineae historis juris naturalis*,[173] were – as part of the so-called *historia literaria* – also a means to claim the historically grounded stability of a specific doctrinal approach[174] and thus indicate a process of consolidation within a paradigm of legal knowledge. In these approaches, history is, again, used as a means of establishing not only collective identity, but also – by way of distinguishing past and present stages of an alleged development – a kind of validity of a given paradigm or perspective.

The question remains if and to what extent such narratives are based on the notion of progress. This is particularly interesting in light of the argument that progress is a concept defining collective temporal perceptions in the periods after 1750.[175] This also leads to a question that will be raised, yet not discussed here: Is it possible that legal discourse will create a history of its own at some point during its development? In other words: To what extent does the »autonomy of law«[176] result in something like an »autonomy of law's history«?

C. *Future: From the Day of Judgment to Risk?*

That the argument about uncertainty and future catastrophes did not emerge prior to the early modern period is well established. Underlying this thesis is the previously mentioned concept of salvation history,[177] where everything is determined by divine will.[178] Thus, only with the shift of responsibility for history from God to mankind does man perceive the future as a human concern and disposability. The emergence of »risk«,[179] both in terms of chance and danger as well as the fundamental scientific change accompanying the rise of mathematics and techniques of probability,[180] led to the »colonisation of the future« mentioned above.[181] The growing impact of technology on all areas of human life, however, would result in the collectivization of risk by the emerging welfare state and eventually in the emergence of the risk society.[182]

This narrative, however, has become the subject of critique.[183] In fact, the perspective of the medieval period has to an extent already been called into question. Indeed, everything from the practice of medieval wills and medieval foundations points to the overarching concept of determined future as embodied in the idea of purgatory and doomsday.[184] On the other hand, it has already been demonstrated that in the early Middle Ages a broad

171 For an introduction and survey, see McGregor (2012) with further references. For an excellent case study, beyond the problems of transitional justice, based on Swiss constitutional history, see Schürer (2009).
172 Survey in Lepsius (2016) with further references.
173 Thomasius (1719/1972), Praefatio, headline of section 1 (ibd., 2).
174 Thier (2011) 225.
175 Koselleck (1985a/2004a) 265–268. Skeptical of this argument Czock (2016) 117–118, with further references, pointing to the notion of progress already in medieval concepts of temporality.
176 Rückert (1988).
177 See above, at note 159.
178 See, for example, the impressive contribution by Lindenau / Münkler (2012); heavily condensed but also very coherent Luhmann (1991) 16–23. As a survey on this narrative, see Thier (2017) 848–849, with further references, Zwierlein (2011) 21–23.
179 On the historical semantic of the term »risk«, see Rammstedt (1992).
180 Bernstein (1996).
181 Above, note 122.
182 Ewald (1993); Beck (1986); Giddens (1991) 109–143.
183 Zwierlein / Graf (2010) 14–16; Zwierlein (2011) 23–24, 365–366; see also Itzen / Müller (2016) 12–13.
184 Survey in Schmolinsky (2013) 96–98 with further references.

variety of possible perceptions of the future existed, which specifically included the possibility of a – though limited – protected human future.[185] Moreover, it appears that the handling of natural disasters via rules of *periculum* and liability represented a consolidated tradition of Roman law and its medieval continuations.[186] On the other hand, it seems as if the early modern practice of *Policey* was deeply committed to the idea of a strong divine presence in history, which itself was perceived as a kind of risk.[187] However, if we look beyond these kinds of objections, we might notice that something more important is at stake in the present context: Dealing with the future understood in terms of uncertainties and risks has apparently been the subject of a more or less steady legal evolution; one that follows a pattern not only of the rising collectivization of risks but also of the emergence and rise of a type of statehood. The longer these states persisted, the more responsibility they took over for the potential dangers and, as a consequence, increasingly also for risk allocations in general. This path of development came to the fore with the establishment of governmental insurances initially against fire damage and, then, since the late 18th century for social security.[188] Nevertheless, at this point a great share of the risk remained with the individual. A famous judgement by the Supreme Court of Massachusetts, Suffolk and Nantucket (1842), makes this especially clear: In allocating the risk of working accidents caused by a third party to the employee, the court made unmistakably clear that »resulting from considerations as well of justice as of policy […] that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly.«[189] This strictly individualistic perspective found its counterpart nearly 60 years later in a statement regarding speculative action in the financial markets, which by this point had already developed into a fiercely debated economic practice.[190] Yet Oliver Wendell Holmes Jr. left no doubt that he and the Federal Supreme Court of the United States were not prepared to set limits to these individual risk actions: »Speculation […] by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices, and providing for periods of want«.[191] Individual economic freedom, as guaranteed by the law, translated into the freedom to bet on the future and was perceived here as a necessary part of social evolution.[192]

But in the course of further development, this kind of individualization of the future and its economic risk was increasingly limited in order to protect the investors' interests and, more recently, the finance system.[193] While this kind of governmental intervention left the legal guarantee of acting with regard to the future intact, in the field of technology – and due to their fundamental risk for the whole of mankind – the longer the state existed, the greater its power to make decisions about risk on its own and with binding force.[194]

In general, in its function and relationship to law and legal knowledge, it appears as if the future as a temporal dimension might have undergone a greater degree of change than other elements of time perception. Apart from the fact that the »colonisation of the future« is seemingly perceived as an endeavor not solely residing with the individual and without any kind of regulation, there might be another reason for this: Technological evolution has actually resulted in the fact that

185 Butz (2016), Czock (2016), Kleine (2016), Schlieben (2016). In a similar direction, see Schmolinsy (2013) 100–101 and passim.

186 Etier (2006).

187 Summarizing Thier (2017) 852–854. In more detail and including the debate about »security«, see Härter (2010), Simon (2004) 135–141.

188 Zwierlein (2011) 262–314.

189 Nicholas Farwell vs. The Boston and Worcester Rail Road Corporation 45 Mass. 49 (1842) 57, 59. On this case, see Levy (2012) 7–20, Thier (2017) 859–860.

190 Engel (2013), see also Stäheli (2007).

191 Federal Supreme Court of the United States, Board of Trade v. Christie Grain & Stock Co., 198 U.S. 236 (1905) 247.

192 Thier (2017) 857 with further references.

193 For a survey from a Swiss perspective with multiple references, see Contratto (2013).

194 Seminal contribution by Di Fabio (1994) from a doctrinal rather than a historical perspective.

future development could very well prove itself extremely dangerous for all of mankind, for instance, in the case of nuclear power, pharmaceutical products, or genetic manipulation. And such dangers could manifest themselves very quickly. In other words, it might be that technological progress has in a certain sense resulted in a contraction of the future, and law and legal knowledge process this contraction via the development of rules like the precautionary principle and its enhancement.

D. *Acceleration*

It is certainly true that acceleration is nowadays one of the dominant modes of collective experience.[195] Globalization and, to an even greater extent, the spread of digital communication have in fact led to a highly accelerated stream of news, impressions, and thus challenges. While it seems that the legal cultures have from very early on included the notion of time compression and urgency, it is only since around the middle of the 19th century that this temporal dimension developed and exerted a more profound impact on legal evolution. This argument stems from the observation about the history of the formula *periculum est in mora*: the expression *dilatio periculum allatura est* (delay will occasion some danger) in Roman law,[196] which contains an exception to the obligation to notify the public about new building projects when watercourses and sewers were at issue. However, this more or less peripheral rule underwent at the beginning of the early modern period a remarkable extension. Jason de Mayno summarized the general opinion that the Roman law text would create »the rule, which is frequently referred to nowadays, that we, when danger is in delay, deviate from the rules of the general law (*regulis iuris communis*) and that the arrangement of laws, even from prohibitions, is loosened«.[197] Neither the evolution nor the background of this concept is particularly clear. Nevertheless, it was apparently quite successful, and in 1714 a dissertation tracing the *periculum est in mora* throughout the entirety of the legal order was published.[198] This strongly suggests that the perception of situations involving compressed time were fairly widespread. The next, and apparently final, step was taken in the 19th century with the introduction of the law of emergency decrees in constitutions like the Prussian Constitutional Charter 1848[199] and later in other modern constitutions or constitutional practices such as emergency law in the case of the Swiss federal constitution of 1874/1999.[200]

Of course, this short survey can offer little more than a few general impressions. Nevertheless, it might have become clear that the notion of urgency represents a subject familiar to the Western legal tradition, and in this regard it is even older than the present notions of acceleration. The reason for this phenomenon could be the temporal function of legal normativity, which clearly has to ensure some kind of continuity in order to generate expectations of trust and safety.[201] Given this function, every notion of urgency in law presents a problem, for, as Jason de Mayno made clear, the validity of law is at stake. On the other hand, it is very likely that a more or less elaborated legal culture cannot afford to neglect the problem of time compression, for otherwise a very real danger exists in urgent situations that legal norms would not be followed. This strongly suggests that legal orders are always preoccupied with the question as to how to create norms that are enforceable, especially when it comes to emergency situations. Given this intimate relationship between temporality and legal orders, it would be interesting to ask if and to what extent these kinds of temporality were the subject of reflection in any given historical context.

V. Concluding Remark

Even from the handful of notions of time dealt with here, it is quite obvious that law and legal

195 See in particular the contributions by Rosa, above, note 91.

196 Cf. D. 39.1.5.12; for the translation, see Watson (1998) 376.

197 Cf. De Mayno (1598), ad D. 39.1.5.11, n. 1, fol. 20vb: *No(ta) ex illo tex(to) regulam, quam quotidie allegatur, quod ubicumque peri(culum) est in mora, tunc recedimus a regulis iuris communis, et remittit(ur) iuris dispositio, etiam prohibitiva*.

198 Müller (1714).

199 On this provision, see Grünthal (1982) 53–65.

200 Kley (2013) 338–342, 383–384; Bellanger (2001).

201 See already above, at note 103.

knowledge process different historical notions of temporality. It has been suggested in this contribution that law includes something like metahistorical elements with regard to its relation to time. As a result, legal historical research focusing on the temporality of law is able to do more than enhance our knowledge about different cultural, social, and historical perceptions of time. It could also contribute to the important question put forward by Joachim Rückert,[202] namely, to what extent has law represented and continues to represent a phenomenon of autonomy. An important step toward answering this question could (and should) be a history of law, legal knowledge, and temporality focusing on the Western tradition. The next step would involve a comparison of the notions of time in the history of the Western legal tradition with other legal cultures, for instance, in Asia or Africa. In this regard, the history of law and time is truly a subject of global legal history research.

■

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